technology." In the first instance, this latter phrase raises definitional problems of its own. In addition, even "similar" technologies are not necessarily operationally identical. Finally, such a presumption would have a tendency to bind LECs to older technologies as newer ones emerge, rather than encouraging innovation.

Consistent with this notion of a flexible definition, USTA offers in its Comments in this proceeding a set of broad guidelines and criteria for evaluating whether a requested interconnection point is technically feasible. BellSouth supports those criteria as an appropriate framework for reducing theoretically feasible interconnection requests to practical implementation. These criteria recognize that a number of factors beyond the mere physical connection of facilities must be addressed to ensure feasibility. These factors include necessary support systems, performance standards, industry standards, network reliability and exposure to harm,[41] and service and security requirements.

Further, USTA proposes in its Comments a bona fide request (BFR) process for ensuring that legitimate requests for interconnection are considered promptly and that spurious requests do not impose a drain on incumbent LECs' time or other resources. Additionally, USTA's BFR process ensures that incumbent LECs do not assume the financial risk of a requesting carrier's subsequent decision not to purchase the

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[41] Network reliability and potential harm to the network are properly recognized by the Commission as issues to be considered in determination of technical feasibility. The Commission suggests, however, that parties asserting these issues should have the burden of supporting their assertions. While BellSouth does not oppose such a procedural responsibility in general, BellSouth submits that the absence of a substantial and compelling showing to the contrary by a requesting party. LECs' showings of likely or potential harm should be accorded a presumption of validity. Moreover, requesting carriers pursuing interconnection over LECs' objections based on network reliability or security concerns should be required to assume the financial risks or liabilities associated with such potential harms before the requested interconnection should be required.

interconnection originally requested. BellSouth agrees that such allocation of financial responsibility is a critical aspect of good faith negotiation on the part of the requesting carrier.

Moreover, the process proposed by USTA is not unlike that adopted by the Commission in its ONA proceedings. There, the Commission required carriers subject to those orders to respond to enhanced service providers' requests for new service capabilities within a specified time frame -- in that case, 120 days.[42] Similar to the opportunity available to ESPs to complain to the Commission if dissatisfied with the carrier's response, carriers requesting interconnection under the Act may pursue arbitration before state commissions if dissatisfied with the incumbent LEC's response.

A flexible approach to a determination of technical feasibility is also consistent with approaches taken by a variety of states. In BellSouth's region, where states have adopted negotiation procedures comparable to the federal Act, the states have refrained from adopting specific enumerations of mandatory interconnection points. For example, Alabama simply requires that "local service providers...make their networks available for interconnection and that all networks...be 'open' and interoperable with all other local

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[42] It also should be noted that the Commission expressly approved the use of nondisclosure agreements between an ESP requesting a new service and the carrier, finding them to be a reasonable accommodation of the need to exchange proprietary data in the course of analysis of the ESP's request. Filing and Review of Open Network Architecture Plans, 6 FCC Rcd 6723, ¶ 55 (1991). No reason exists to suggest that nondisclosure agreements that are reasonable in the ONA context are somehow indicative of less than good faith negotiation under Sections 251 and 252. Nondisclosure agreements are a crucial underpinning of a process that is dependent on exchange of information, as negotiation is.

networks."[43] The North Carolina Commission has concluded that its interconnection rule "provides sufficient general guidance,...that the remaining details should be worked out in the interconnection negotiations,...[and] [t]hat CLPs and LECs negotiate in good faith on all relevant interconneciton issues."[44] Florida has been only marginally more specific, requiring "interconnection, trunking, and signaling arrangements at the tandem and office end levels," while permitting [m]id span meets...where technically and economically feasible and [subject to] a negotiated arrangement."[45]

(2) Just, Reasonable, and Nondiscriminatory Interconnection

The Act requires incumbent LECs to provide interconnection on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Again, the Commission questions whether it should adopt national guidelines or standards regarding non-price[46] terms and conditions, such as installation, maintenance, and repair. And again, the answer is that it should not.

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43 In re: All Telephone Companies Operating in Alabama, Generic Hearing on Local Competition, Docket No. 24472, Alabama PSC, Report and Order ¶ 20.01 September 20, 1995.

44 Local Exchange and Local Exchange Access Telecommunications Competition, Docket No. P-100, Sub 133, NCUC Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules, February 23, 1996.

45 Resolution of Petitions to Establish Nondiscriminatory Rates, Terms and Conditions for Interconnection Involving Local Exchange Companies Pursuant to Section 364.162, Florida Statutes, Docket No. 950985-TP, Order No. PSC-96-0445-FOF-TP, March 29, 1996.

46 Pricing issues associated with interconnection, collocation, and unbundling are addressed in Section II. B. 2.d.

First, there is simply no reason to do so. Incumbent LECs and other common carriers have long operated under obligations deriving from both federal and state laws and regulations to provide service under terms that are just, reasonable, and nondiscriminatory. In addition, the Act already includes a separate specific obligation of incumbent LECs to make available any interconnection provided under negotiated or arbitrated agreement to other requesting telecommunications carriers on the same terms and conditions.[47] No further "guidance" is needed; the Commission should simply codify these requirements in its rules.

Moreover, adoption of "explicit national standards for the terms and conditions for interconnection" would thwart the clear mandate from Congress for negotiated interconnection agreements. Indeed, through negotiation, parties may reach different results depending on their respective installation, maintenance, or repair needs. Parties may also incorporate agreed upon liquidated damages provisions or any other terms appropriate to minimize risk of loss in the event of nonperformance by the other party. One-sided mandatory liquidated damages requirements as intimated by the Notice,[48] however, clearly are not warranted. Absence of across-the-board standards will allow parties to negotiate for the terms and conditions that are best suited to their needs.

Finally, there is simply no reason to expect that such requirements would be necessary. In comparable circumstances of the Computer III[49] and ONA proceedings[50]

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47 1996 Act, sec. 101, § 252(i).

48 Notice, ¶ 61.

49 Amendment of Section 64.702 of the Commission's Rules and Regulations, (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon.,

and the CPE Relief proceeding,[51] the Commission has required periodic reports of installation and maintenance activity by the BOCs as a means of showing the absence of discrimination in such processes. On at least two occasions, the Commission has noted that in all the years those reports have been submitted, there has been no indication of discriminatory behavior.[52] And, only recently, the Commission proposed to eliminate a number of those reports because of the burdens they impose and the absence of any apparent discrimination.[53] No need exists to adopt special rules to guard against such phantom concerns.

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3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1988) (Phase II Further Reconsideration Order), Phase II Order vacated, California v. FCC, 905 F.2d 1217; Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order); BOC Safeguards Order vacated in part, California v. FCC, 39 F.3d 919.

[50] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), recon., 5 FCC Rcd 3084 (1990); BOC ONA Amendment Order, 5 FCC Rcd 3103 (1990), erratum, 5 FCC Rcd 4045 (1990), pet. for review denied sub nom. California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., FCC Rcd 97 (1993); BOC ONA Further Amendment Order, 6 FCC Rcd 7646 (1991); BOC ONA Second Further Amendment Order, 8 FCC Rcd 2606 (1993), pet. for review denied sub nom. California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

[51] Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987), modified on recon., 3 FCC Rcd 22 (1988),

[52] Computer III Reward Proceedings: Bell Operating Company Provision of Enhanced Services, 6 FCC Rcd 7571, 7602 (1991); Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, ¶ 29 (1995).

[53] See, Revision of Filing Requirements, CC Docket No. 96-23, Public Notice (February 7, 1996).

(3) Interconnection that is Equal in Quality

The Act also requires that interconnection provided by the incumbent LEC be "at least equal in quality" to that provided to any other party, including to the LEC itself or to any affiliate.[54] As above, the Commission queries whether it should adopt criteria for assessing whether interconnection is "equal in quality." As above, the answer is that it should not.

This, like many other provisions of the Act, is a self-effectuating requirement. Once having agreed to a particular level of quality, the incumbent LEC is obligated to offer that level of quality to others carriers requesting similar interconnection. Rather than adopting specific criteria for determination of an appropriate measure of quality, however, the Commission should leave that to the negotiation of the parties as anticipated by the legislation.

(4) Relationship Between Interconnection and Other Obligations Under the 1996 Act

Section 251(c)(6) imposes an obligation on incumbent LECs to provide for physical collocation. While this Section provides the "statutory authority" for collocation for the purposes of Section 251 interconnection, it does not resolve the constitutional issue of whether such a requirement constitutes a governmental "taking" that would

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[54] 1996 Act, sec. 101, § 251(c)(2)(C).

entitle the incumbent LEC to a judicially determined "fair market value" measure of compensation.[55]

The Commission can avoid this issue by permitting the parties to negotiate the appropriate forms of interconnection as well as the terms and conditions that will govern such interconnection.[56] If the parties reach voluntary agreement, there is no constitutional issue to be resolved.

With regard to interconnection arrangements other than physical collocation, Section 251(c)(6) clearly reserves such issues to the negotiation process, with unresolved issues to be decided by the state commissions.[57] The Commission should not attempt to preempt the negotiation process by establishing "national standards" for virtual collocation or meet point billing.[58] There is no evidence that the resolution of these issues by individual states has resulted in interconnection arrangements that are inconsistent with the 1996 Act, or that the belated adoption of "national standards" will facilitate the speedy introduction of local competition

b. Collocation

The Act requires incumbent LECs to provide physical collocation of an interconnector's equipment that is necessary for interconnection or access to unbundled

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55 Nor does this statutory provision grant the Commission the "statutory authority" that was at issue in Bell Atlantic v. FCC. , 24 F.3d 1441 (D.C. Cir. 1994)

56 Notice, ¶ 64.

57 1996 Act, § 251(c)(6) states: ". . . the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical . . ."

58 Notice, ¶ 65.

elements on just, reasonable and nondiscriminatory terms.[59] The Act further provides that a LEC may provide virtual collocation if the LEC demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations.[60] As in the case of other provisions of the Act, the Commission starts from the point that national guidelines would be beneficial.[61] Contrary to the Commission's belief, this is clearly a provision of the Act where rigid, national rules would be counter productive.

The Act establishes the framework for collocation. No single aspect of the variety of obligations that the Act imposes on LECs is more amenable to negotiation. Under the Act, collocation would be required only for equipment that is necessary for interconnection and access to unbundled elements. Likewise, the premises in which collocation would be available would be in those structures where interconnection takes place or unbundled network elements are provided. Because both interconnection and unbundled network elements are matters to be negotiated, the Commission cannot possibly presume to identify the locations where collocation must be offered nor can it identify the equipment that would satisfy the requirements of the Act.

Certainly the experience that has been gained through Expanded Interconnection will serve as a frame of reference for the negotiation process. Indeed, this experience will likely narrow the issues that will arise in negotiations. Nevertheless, the Act establishes a new framework, and to make that framework perform as Congress intended LECs and

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59 1996 Act, sec. 101, § 251(c)(6)

60 Id.

61 See e.g., Notice ¶ 67.

new entrants will have to be free to negotiate arrangements unencumbered by excessive rules and regulations.

The Commission also solicits comments on its tentative conclusion that current Expanded Interconnection policies should continue to apply based on Section 201 and Section 251(g) of the Act. The Circuit Court of Appeals for the District of Columbia Circuit remanded for reconsideration the Commission's virtual collocation order concluding that the Commission's regulations implementing the 1996 Act would render moot the questions about the future effect of the Order.[62] To the extent the Commission vacated its Expanded Interconnection Order in favor of the new statutory scheme, the Court's conclusion would have been correct. The Commission, however, has decided to continue its current policy. Thus, the very question that gave rise to appeal of the Commission's order remains--the authority of the Commission to direct carriers to file tariffs permitting any interstate customer to collocate equipment in a LEC's office.

Nothing in the new Act increased the Commission's authority beyond that which it had under the Communications Act of 1934. In order for the Commission's Expanded Interconnection Order to withstand judicial scrutiny, the authority for that order must be found in Section 201. The Commission misinterprets the Court's remand to the extent it believes the Court was indicating that the Commission had authority under Section 201 to order virtual collocation. To the contrary, it would appear that the Court viewed the Commission's expanded interconnection policy as unnecessary given the Telecommunications Act of 1996.

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[62] Pacific Bell v. FCC, No. 94-1547 (D.C. Cir Mar. 22, 1996).

c. Unbundled Network Elements

Section 251(c)(3) requires incumbent LECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms of the agreement and the requirements of this Section and Section 252." The Act also provides guidance to the Commission, in that when determining whether a network element should be unbundled, the Commission "shall consider, at a minimum,[63] whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such elements would impair the ability of the telecommunications carrier seeking access to provide the service that it seeks to offer."[64] The Commission has proposed to adopt rules to implement these provisions.

First, the Commission tentatively concludes that it is directed by the Act to identify at the outset the network elements that incumbent LECs should unbundle and make available to requesting carriers.[65] BellSouth disagrees that the Act provides such an affirmative direction. Rather, the Act merely provides guidance to the Commission at that point in time when it must identify elements to be unbundled, but does not create the

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[63] It should be noted that the statute identifies the factors which are minimum considerations that the Commission must take into account in determining whether a network element must be unbundled. Nothing in the Act precludes the Commission from also considering other parameters such as whether the unbundled elements would be misused to create a service in lieu of obtaining the service through resale.

[64] 1996 Act, sec. 101, § 251(d)(2).

[65] Notice, ¶ 77.

affirmative obligation to undertake that initiative before parties have had an opportunity to negotiate for access to network elements.

The Commission derives its tentative conclusion from its reading of Section 251(d)(2). According to the Commission, "Section 251(d)(2) provides that the Commission will 'determin[e] what network elements should be made available for purposes of subsection (c)(3).'"[66] This paraphrasing of this section, however, distorts its proper meaning in the context of the Act in its entirety as well as this particular section.

As shown previously and as clearly reflected in the Act, Congress intended that parties negotiate for access to unbundled network elements in the first instance, with recourse to state arbitration processes if agreement cannot be reached. Thus, two means exist for determining the network elements that a LEC will provide, neither of which is dependent on a prior list or minimum set of network elements developed by the Commission. Further, it is only in the event of a state's failure to fulfill its arbitration responsibilities, after the parties have reached a negotiation impasse, that the Commission is authorized to assume responsibility for resolution of the issues at hand. Only then is the Commission authorized under the Act to require the unbundling of specific network elements.

The actual language of Section 251(d)(2), as opposed to the Commission paraphrasing of it, is consistent with the procedural scheme established by Congress. Rather than directing the Commission to identify in advance network elements to be unbundled (or even implying such as the Commission's paraphrasing suggests (i.e., "the

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[66] Notice, ¶ 77 (emphasis added).

Commission will 'determin[e]'")), § 251(d)(2) merely provides guidance when the point has been reached under the statutory procedural scheme for Commission resolution of a disputed network element request. Thus, the language of § 251(d)(2) actually provides: "In determining what network elements should be made available . . . the Commission shall consider . . . ." (emphasis added) Nothing in this language directs the Commission to undertake such an exercise in advance.

Nor is it necessary or desirable (assuming arguendo that the Commission has the authority to do so in advance) for the Commission to establish a minimum set of network elements.[67] Instead, the Commission should allow the "minimum set" to evolve as LECs enter agreements with requesting carriers. This will avoid development of a list of mandatory network elements -- and the incurring of obligations associated therewith -- many of which may never be purchased by requesting carriers.

The likelihood of such a result should not be underestimated. In seeming contradiction of its perspective reflected in the foregoing footnote, the Commission has requested parties to "identify and describe, in brief, each network element for which they believe access on an unbundled basis is feasible at this time."[68] This invitation is likely to result in "wish lists" of network elements, with no associated representation of commitment to purchase access to the requested element. Any list based on such nominal

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[67] Although not supportive of a list of a minimum set of network elements, BellSouth is at least appreciative of the Commission's recognition that it should not attempt to "itemize an exhaustive list" of network elements. Notice, ¶ 77.

[68] Notice, ¶ 87.

input would significantly detract from an efficient implementation of local competition through detailed, negotiated agreements.[69]

The Commission also inquires whether any national rules that it adopts should accommodate variances among the states. BellSouth believes that this issue should be answered in the affirmative, in the first instance, and that the best way to accommodate those variances -- which are to be expected as a result of the negotiation process -- is not to overlay a national framework on state specific arrangements.

In analogous circumstances, the Commission has previously recognized the need to refrain from imposing a requirement for a mandatory set of unbundled service elements. In declining to identify a uniform set of unbundled ONA services, the Commission expressly recognized factors that required distinction among the BOCs as well as the down side of over-emphasis on commonality:

> Rather than imposing by regulatory fiat a single method of delivering [an unbundled service element], we believe that appropriate delivery methods should be determined by market demand and inter-industry effort . . . . We are also concerned that mandatory technical uniformity that is not market driven could stifle choice, flexibility and innovation. We reject any course that would limit appropriate means of delivery to the lowest common denominator available to all the BOCs, thereby retarding beneficial technological growth and advancement [70]

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[69] This phenomenon was experienced in the original ONA process. ESPs originally submitted requests for over 157 unbundled service features. Although that group was eventually culled down to a common list of 118, a number of ONA services offered by BellSouth are not being purchased to any measurable degree.

[70] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, ¶ 208 (1988).

The same factors that mitigated against imposition of a uniform set of unbundled ONA services to be provided by all of the BOCs also dictate that the Commission not hamstring the states in their ability to approve or require specific unbundled network elements through the negotiation/arbitration process.

(1) Network Elements

In the Notice, the Commission recognizes that the term "network element" has been defined in the Act.[71] However, the Commission raises several questions about that definition, including the relationship between the Act's provisions for unbundling of network elements and other provisions of the Act.

First, the Commission queries whether a network element, once identified, is subject to further subdivision into several network elements. BellSouth believes that because of the Act's emphasis on negotiated agreements for unbundled network elements, parties to the negotiation are free to agree on whatever level of granularity makes sense for them both. The outcome of the negotiations, of course, will turn on the technical feasibility and economic considerations of the degree of unbundling requested.[72] The key

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[71] Notice, ¶ 83. "The term 'network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 1996 Act, Sec. 3, § 153(29).

[72] Issues of technical feasibility, including operational, administrative, performance, and network reliability issues, would all be resolved following a bona fide request for access to a particular unbundled network element.

is that the flexibility implicitly desired by the Commission is built into the negotiation process designed by Congress.[73]

Second, the Commission inquires whether there is any significance to the distinction drawn in the Act's definition of "network element" between the "facility or equipment used in the provision of a telecommunications service" and the service itself. BellSouth believes that the significance is in the distinction itself. The plain and unambiguous language used by Congress is a clear indication that the network element unbundling provisions of the Act were not intended to be manipulated as a means of avoiding the Commission's existing access charge regime.

Finally, the Commission solicits comment on the relationship between the Act's provisions for providing access to unbundled network elements and its provisions authorizing resale of services that LECs offer at retail to end users. Specifically, the issue is whether requesting carriers may order and combine unbundled network elements to offer the same services an incumbent LEC offers for resale under Section 251(c)(4).[74]

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[73] Flexibility is clearly preferred if it can be accommodated. However, specificity will be the key. For example, an unbundled loop may require several network elements to be defined in order that all situations may be covered. One network element might be defined using a copper pair as the facility, while another may be defined using subscriber pair gain devices. Still others may be required to distinguish between different types of pair gain facilities or other technologies, such as ISDN. The clear inference to be drawn is that the negotiation process between parties who can investigate the specifics of any given request offers much greater flexibility than would unbundling requirements derived through rulemaking proceedings.

[74] Section 251(c)(4) requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 1996 Act, Sec 101, § 251(c)(4).

BellSouth firmly believes that such a result would be incongruous with the purpose of the Act and the intent of Congress.

As the Commission properly noted, the apparent tension between the application of the unbundling and resale provisions of the Act arises because of the disparate pricing standards imposed by the Act on these provisions. Interexchange carriers have already indicated that they plan to take advantage of this disparity as a means of avoiding paying wholesale rates for services that they would otherwise resell. Were the Act to offer them this opportunity, however, it would render meaningless the resale provisions. Congress, of course, clearly did not intend to include gratuitous, meaningless requirements in the Act.

Instead, Congress structured the statute to encourage facilities based competition.[75] The resale provisions and their associated pricing structure allow new competitors to enter rapidly the local exchange marketplace, but do so without undercutting incentives for the competitors eventually to build out their own networks.

The Act also provides specific guidance to the Commission for determining whether new entrants should be permitted to re-bundle unbundled network elements in lieu of buying services at wholesale rates. Section 251(d)(2) directs the Commission, in determining whether unbundled elements should be made available, to consider whether

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[75] Congress' expectation that the 1996 Act would result in the establishment of facilities based local exchange competition is evidenced in several of the statutory provision. For example, Section 214(e) sets forth the requirements of an eligible carrier for purposes of receiving universal service support as one which the offers universal service through its own facilities (exclusively or in combination with resold services). Similarly, Section 271 which governs in-region interLATA relief for the BOCs also conditions such relief on the presence of a facilities-based competitor.

the unavailability of the network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[76] By definition, the availability of a service at wholesale rates indicates that a requesting carrier does not need access to the unbundled network elements comprising that service in order to be able to offer the service. The requesting carrier's ability to offer the service at retail is not impaired, and LECs should not be required to unbundle elements merely for the purpose of permitting replication of services available at wholesale rates.

Permitting network elements to be bundled into the equivalent of retail services, as advocated by IXCs, would also be contrary to Section 251(c)(4)(B). That section permits states to "prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."[77] Under the IXCs' theory, a requesting carrier could easily evade those prohibitions by buying and combining unbundled elements to offer to a category of customers the very same service that the carrier is prohibited from offering to those customers on a resale basis. Congress clearly did not intend that powers it expressly reserved to the states could be so easily overcome by unilateral behavior of new competitors.

Accordingly, BellSouth urges the Commission to clarify that carriers may not request unbundled network elements for the purpose of recombining them to offer services that are available to the carriers under the Act's resale provisions.

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[76] 1996 Act, sec. 101, § 251(d)(2).

[77] 1996 Act, sec. 101, § 251(c)(4)(B).

(2) Access to Network Elements

The Commission notes that it interprets the requirements of "access" to network elements "on an unbundled basis" to suggest that network elements to be made available should be provided separate from any other network element and at a separate charge. Subject to the predicate condition that such separation of elements must be technically feasible, BellSouth concurs in the interpretation of "unbundling" presented by the Commission.

Recognizing the importance of this predicate condition both from a statutory standpoint and from a practical standpoint, the Commission solicits input as to the meaning of, or means of determining, "technical feasibility." The issues here, however, do not appear to vary materially from those raised with respect to "technical feasibility" of specific interconnection arrangements, and BellSouth will not repeat its arguments here.[78] Suffice it to say that resolution of questions of the technical feasibility of unbundling a requested network element are better left -- and under the Act are to be left -- to the parties to the negotiation process, and then to the states if the parties cannot reach agreement. This Commission should not attempt preemptively to determine the technical feasibility of any specific unbundling proposal.

In addition to technical feasibility, the Act directs the Commission, when determining whether a network element should be unbundled, to "consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and

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[78] See Section II. B. 2. a. (1), *supra*. Similarly, BellSouth has previously addressed issues raised by the Commission's consideration of national or uniform terms and conditions. See Section II. B. 2. a. (2), *supra*.

(B) the failure to provide access to such elements would impair the ability of the telecommunications carrier seeking access to provide the service that it seeks to offer."[79] The Commission solicits comment on the extent to which it must "consider" these issues and on any other issues that should be considered, such as whether the unbundling must be economically reasonable.

Although most of the issues involving unbundled network elements should be resolved through the negotiation/arbitration process, if the Commission finds itself in the position of reviewing specific unbundling proposals the Commission clearly is obligated to consider the factors specified by Congress. Moreover, in considering these factors, the Commission should operate under a presumption that a particular unbundling should not be required if it would require access to proprietary elements or if it is not necessary to avoid impairment of the service the requesting carrier seeks to offer.

For example, access to elements in a manner that necessarily would reveal a third party's proprietary protocols or to a database that contains the LEC's or any of its customers' (including other carriers) proprietary information should be presumptively not permitted. Any party who seeks access to such elements should carry the heavy burden of demonstrating why another party's proprietary interests should be jeopardized by such access. Similarly, a party seeking access to an unbundled element that is not necessary to avoid impairment to the service it seeks to offer should have the burden of showing why such an element still should be unbundled.

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[79] 1996 Act, sec. 101, § 251(d)(2).

In addition to these factors specifically delineated by Congress as a *minimum*, the Commission should also consider the economic reasonableness of the request, particularly as it relates to the allocation of financial risk if the requesting carrier fails to follow through with the purchase of the requested unbundled element. For example, incumbent LECs should be permitted to require requesting carriers to post bond or pay liquidated damages in the event of their nonperformance following an unbundling request. The Commission should consider a requesting carrier's refusal to provide such assurances as sufficient grounds not to require the requested element to be unbundled.

Finally, the Commission inquires as to the meaning of the requirement that unbundled network elements be provided "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service."[80] This provision is both an amplification and a limitation on the LEC's obligation when providing unbundled elements. As an amplification, the clause ensures that network elements are identified with enough specificity so that both their characteristics and appropriate uses are well defined. As a limitation, the clause confirms that the LEC's obligation extends only to providing network elements for use in a telecommunications service, not to other uses such as cable services or information services.

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[80] IXCs, of course, have asserted that this language permits them to recombine unbundled elements to replicate services offered at retail by the LEC. That proposition has been rebutted in Section II. B. 2. c. (1), *supra*.

(3) Specific Unbundling Proposals

As explained above, BellSouth does not believe that the Commission is obligated by the Act to adopt specific unbundling requirements at this time.[81] Nevertheless, the Commission has proposed to require specific unbundling in each of four categories of elements: loops, switches, transport facilities, and signaling and databases. While BellSouth will provide unbundled elements for these four categories, BellSouth does not believe the Commission should specify the detailed elements but instead should permit the negotiation process to be the primary determinant of the precise elements to be provided. The Commission's proposals in each of these categories are addressed below.

(a) Local Loops

The Commission tentatively concludes that unbundling a local loop is technically feasible. BellSouth believes that a loop should be one of the unbundled elements to be provided by incumbent LECs. The requirement, however, should be no more than that which is specified in Section 271, i.e., a loop unbundled from switching. Any other details that the Commission attempts to enumerate would be counterproductive.

The functionality of the loop is commonly understood as the connection between a central office and an end user's premises.[82] While the functionality is straightforward, the provisioning of a loop is far more complex. Hence, the term loop is generic, with the

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81 See Section II. B. 2. c., *supra*.

82 USTA proposes that the unbundled loop be defined as the transmission path from a point of interconnection in the central office determined by the incumbent LEC to an individual customer's premises. BellSouth endorses this definition and believes it provides the appropriate analytical framework for unbundling loops.

fundamental characteristics of the unbundled loop being defined by the particular interconnector's request. For example unbundled loops could be requested to support a basic voice grade connection to a residence or a primary rate ISDN line. Both would be unbundled loops, but the characteristics of the loop would be significantly different.

These differences illustrate the pitfalls associated with attempting to over-specify the unbundling requirement. Other than requiring an unbundled loop be made available, the Commission's rules should be silent. Carrier-to-carrier negotiations will determine the characteristics desired by the interconnector and to be provided by the incumbent LEC. The Commission is misguided if it believes that it should attempt to impose a national structure for unbundled loops.[83] The Commission cannot hope to reduce complex local networks down to some common denominator. The diversity that defines the local networks must be accommodated by the Commission, not ignored. It should not be expected that every capability be provided out of every office to every customer premises, nor should it be expected that each incumbent LEC provide precisely the same capabilities as every other LEC. The local differences that currently exist and will continue to exist within an individual LEC's local network(s) as well as among LECs are precisely the reason why negotiations will achieve the unbundling contemplated by the Act far more satisfactorily than any national standard prescribed by the Commission.

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[83] See, Notice ¶ 96.

The Notice also proposes to require subloop unbundling.[84] Such a requirement should not be adopted. The Commission's inquiry evidences a basic misconception regarding local networks. It confuses network elements on the one hand, and the equipment and facilities used to provide network elements on the other. The Commission focuses too much on physical points where network equipment and facilities can be disassembled. It overlooks entirely the question of the operation of the network elements; that is, the items that are necessary to make the element work such as support systems that inventory circuits and facilities that are essential to installation, maintenance and repair. The necessary support systems do not exist to make subloop unbundling work. Subloop unbundling without appropriate support systems will impair the reliability of the LECs' local network as well as the service provided to end users.

Moreover, there is no reason for the Commission to mandate subloop unbundling. The purpose of the Act is not to dismantle the LEC network or to cause a LEC to rebuild its network. The requirements of the Act provide the means whereby new competitors can use the existing networks of incumbent LECs until their own competing networks are completed. The intent is that the LEC network elements will be used by new facilities based competitors to fill out their networks. As such, the new entrants take the LEC networks as they find them, including the operational limitations of its support systems.[85]

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[84] Notice, ¶ 97. The Notice identifies as possible subloop elements: access to loop feeder and distribution plant at remote switching or concentration sites and access to the switching and concentration equipment.

[85] This is not to suggest that BellSouth will not engage in good faith negotiations with a carrier that makes a bona fide request for a subloop component. The negotiation process, however, will enable the parties to engage in a full discussion of the operational

(b) Local Switching

The Commission identifies local switching as an element that should be unbundled finding that such unbundling is critical to the implementation of Section 251 of the Act and the provision of competing telecommunications services.[86] Local switching, unbundled from the loop and transport and other services, is an element on the competitive checklist set forth in Section 271(c)(2)(B) and evidences Congressional intent that it be an unbundled network element under Section 251 and be made available to new local competitors. BellSouth believes that the Commission need only specify that unbundled switching will be provided by incumbent LECs.

The Commission correctly observes that the shared nature of local switching makes it difficult to identify or define the use of such equipment for a particular customer.[87] Despite the Commission's recognition of the obvious pitfalls of an approach that attempts to identify and define the use of switching, the Commission, nevertheless, proceeds down that path. BellSouth urges the Commission to adjust its approach. A network element under the Act is not limited to just equipment and facilities but also to features and capabilities provided through such equipment and facilities.[88] From this perspective, the unbundled local switching is providing switched connections to a requesting telecommunications carrier using an incumbent LEC's network.

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constraints that exist, to explore alternative approaches to addressing these constraints and consider the cost of implementing any new interconnection point.

86 Notice, ¶ 98.

87 Id., ¶ 99.

88 §153(a)(48)

The switching port, in BellSouth's view, provides an effective means to deliver to competitors the unbundled switching functionality. It provides the connectivity to the switching features associated with telephone line and telephone numbers; the line to line switching functionality; the line to trunk switching function; and inter-local switch connectivity. The switching port, then, affords a ready means by which new entrants can fill out their networks, the overriding objective of requiring incumbent LECs to provide unbundled network elements.

BellSouth concurs with USTA that some suggested approaches to defining unbundled switching, such as switch capacity, are amiss. They are based on "sounds good" concepts that bear little relation to the way in which local networks are configured and operate. Accordingly, these approaches are little more than theoretical constructs with little practical value.

Furthermore, the switching port approach provides the basis, through further negotiations, to develop other functionalities that are tailored to specific circumstances to the requesting carrier. In time, it may be that some carriers may want switching functionalities limited to specific offices and interconnected directly to their networks using their trunks. Negotiations would enable the LECs to explore developing these functionalities. At the outset, there are finite limitations regarding the degree to which a switch can accommodate multi-carrier specifications. Thus, factors such as the number of carriers, the scope of the request, and the location of the switch will bear upon the feasibility of any request.[89] The variability of these factors lend themselves to a negotiated

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[89] For example, BellSouth offers several different types of local exchange services, 1FR (residential), toll restricted service, 900 restricted service etc. Each type is called a